IN THE HIGH COURT OF JUDICATURE
ANDHRA PRADESH
AT HYDERABAD

THE HON'BLE SRI JUSTICE J.CHELAMESWAR
AND
THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

WP No. 25048 of 2005

Between :

P.Venkata Subba Reddy .. Petitioner

And

Government of Andhra Pradesh
Rep. by its Principal Secretary and
four others .. Respondents

Dated :4th August, 2006

JUDGMENT : (per JC,J)

The petitioner is a physically challenged person with hearing impairment. He completed his Intermediate Education, obtained Teachers Training Course certificate. The 2nd respondent herein issued a notification on 11.5.2002 calling for applications for the post of Secondary Grade Teachers in Kadapa District. The notification indicated that the total number of posts sought to be filled up are 691 and 7 posts are reserved in favour of physically challenged (hearing impairment category), the petitioner applied and appeared for written

examination conducted for the purpose of recruitment. Admittedly, he secured 64 marks in the written examination. The petitioners complaint is that some candidates were selected under the same category, who though secured better marks than the petitioner, are not candidates genuinely suffering from hearing impairment. They are not entitled for consideration for the recruitment under the said category. It is the further complaint of the petitioner that in the year 2001 in a similar selection process in Kadapa District, 9 candidates were selected and appointed under the hearing impairment category of physically challenged impaired persons, but on an examination by the ENT Hospital, Koti, it was found that all the nine candidates are not entitled for such appointment in the said category as they did not either suffer any impairment or the impairment was not of the prescribed level.

The petitioner therefore filed OA No.3562 of 2003 before the Andhra Pradesh Administrative Tribunal praying in substance to send all the candidates claiming under the category of physically challenged (hearing impairment) for medical examination and select the deserving candidates. He also prayed that in view of Section 36 of Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for short `the Act'), the unfilled posts of the 2001 District Selection Committee (DSC) are also

required to be carried forward and are required to be filled up with eligible candidates appearing in response to the notification issued in 2002. As no interim order was passed in favour of the petitioner, nor was a final decision rendered by the Tribunal, the petitioner approached this Court with the present writ petition with the prayer as follows :

> "Further reasons stated in the accompanying affidavit, the petitioner herein prayed that this Hon'ble Court may be pleased to issue Writ, Order or direction more particularly a Writ one in the nature of Writ of Mandamus to declare the inaction of the respondents herein as violative of provisions the persons with Disabilities (Equal opportunities, Protection of Rights and Full participation) Act, 1995 and Article 14 and 253 of the Constitution of India directing the respondents herein to send all the candidates who applied under the physically handicapped hearing impairment (Deaf) category for the 4 posts of DSC-2002 SGT Telugu for Kadapa District to be examined the appropriate Medical Board and to select the next meritorious genuine candidates and pass such other order or orders."

A counter affidavit was filed in the Tribunal by the respondent wherein the State denied the obligation to carry forward the unfilled vacancies, belonging to the category in question to be carried forward. The relevant part of the counter reads as follows :

> "In reply to Para No. 6(d) it is submitted that as per G.O.Ms.No.72 Education department dt. 03.07.2000 and as per G.O.Rt.No.20796/Ser VI-3/2002 dt. 02.06.2003 the non joining posts should not be filled up and such vacancies could not be shown as vacancies and carry forwarded to DSC. Hence the plea of the applicant is against the recruitment rules…."

It is also stated in the counter affidavit that the posts reserved in favour of the category in question insofar as the DSC 2001 were not filled up. In this regard, it is stated in the counter as follows :

> "In reply to Para No.6(e) it is submitted that the posts reserved for PH (HH) category in DSC 2001 were not filled up due to all selected candidates are found as bogus as per Lr.Rc. No.149/ENT/2002 dt. 15.2.2002 of the Superintendent, ENT Hospital, Hyderabad. Hence

these posts are treated as non-joining."

Appalled by the stand taken by the State in denying its obligation to carry forward the posts as can be seen from the extracted portion of the counter, on the face of a statutory obligation under Section 36 of the Act which leaves no such choice to the State and the fact that even on the face of such a counter affidavit, the Andhra Pradesh Administrative Tribunal has never thought it fit to consider the issue at an early date, we thought it fit to examine the whole issue. Various orders have been passed by the Bench on 1st December, 2005, 16th December, 2005, 20th December, 2005 and 23rd December, 2005.

Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 is an enactment made by the Parliament pursuant to a Treaty obligation incurred by India. In the preamble to the Act, it is stated as follows:

"Whereas the Meeting to Launch the Asian and Pacific Decade of Disabled Persons 1993-2000 convened by the Economic and Social Commission for Asia and Pacific held at Beijing on 1st to 5th December, 1992, adopted the Proclamation on the Full Participation and Equality of People with Disabilities in the Asian and Pacific Region;

And Whereas India is a signatory to

the said Proclamation;
And Whereas it is considered necessary to implement the Proclamation aforesaid."

Under Article 253 of the Constitution of India, the Parliament has the legislative authority to make a law pursuant to any treaty obligation incurred by the country irrespective of the fact whether the subject matter of legislation arising out of treaty obligation is assigned to the Parliament or the Legislatures of the States.

The Act insofar as it is relevant for the present purpose is Chapter VI of the Act which deals with employment. Section 32 of the act mandates that the appropriate Government shall identify the posts in the establishment which can be reserved for the persons with disability. The expression `appropriate government'' itself is defined under Section 2(a) as follows :

2. (a) "appropriate Government" means,-

(i) in relation to the Central Government or any establishment wholly or substantially financed by that Government, or a Cantonment Board constituted under the Cantonment Act, 1924, the Central Government;

(ii) in relation to a State Government or any establishment wholly or substantially financed by that Government, or any local authority, other than a Cantonment Board, the State Government;

(iii) in respect of the Central Coordination Committee and the

Central Government Executive Committee, the Central Government;

(iv) in respect of the State Coordination Committee and the State Executive Committee, the State Government;

Further the expression "establishment" is also defined under Section 2(k) as follows :

> "(k) `establishment' means a corporation established by or under a Central Provincial or State Act, or an authority or a Government Company as defined in section 617 of the Companies Act, 1956, and includes Departments of a Government;

In substance, on a conjoint reading of the above two definitions with Section 32 it is a mandate of the Parliament that in the matter of employment either under the State Government or the Government of India or any other instrumentality of those governments which is wholly or substantially financed by such governments, the governments are required to identify the posts which can be reserved to be filled up with persons with disability and also conduct a review periodically, however, in a period not exceeding three years for such identification. Under Section 33, the appropriate Government is mandated to reserve certain percentage of vacancies not less than 3% in favour of persons with disability of the various categories specified under the said Section. Under the proviso to the said Section, the

appropriate Government is empowered to exclude any establishment from the operation of provision of Section 33 by a notification and also subject to such conditions if any as may be specified in the said notification.

> **33. Reservation of posts –** Every appropriate Government shall appoint in every establishment such percentage of vacancies not less than three per cent for persons for class of persons with disabilities of which one per cent, each shall be reserved for persons suffering from –
> (i) blindness or low vision;
> (ii) hearing impairment;
> (iii) locomotor disability or cerebral palsy, in the post identified for each disability :
> Provided that the appropriate Government may, having regard to the type of work carried on in any department or establishment, by notification subject to such conditions, if any, as may be specified in such notification, except any establishment from the provisions of this section.

Section 36[§] mandates that if any vacancies cannot be filled up as contemplated under Section 33 in a recruitment year due to the non-availability of a eligible candidates or for any other sufficient reason, such vacancy shall be carried forward to the succeeding recruitment year. It further stipulates that even in the succeeding year that if the suitable candidate is not available in the particular category, then such a vacancy

shall be inter-changed among the remaining categories of the disability indicated in Section 33.

The case on hand is concerned with the claim of a person with hearing impairment. The expression `hearing impairment' itself is defined under Section 2(l) as follows :

> "2(l) 'hearing impairment' means loss of sixty decibels or more in the better ear in the conversational range of frequencies;"

Loss of 60 decibels or more in the better ear in the conversational range of frequencies is defined to be disability of hearing impairment category. In other words, it is not the total loss of hearing faculty that makes it hearing impairment for the purpose of the Act but the loss to the extent of the hearing faculty as specified under Section 2(l) which makes it `heairing impairment'.

The expression `disability' itself is defined under Section 2(i) as follows :

> "(i) `disability'means –
> (i) blindness;
> (ii) low vision;
> (iii) leprosy-cured;
> (iv) hearing impairment;
> (v) locomotor disability
> (vi) mental retardation;
> (vii) mental illness;

and the expression `person with disability is defined under Section 2(t) as follows:

> "person with disability" means a person suffering from not less than

> forty per cent of any disability as certified by a medical authority;

It appears from the examination of the above referred provisions of the act that though seven kinds of disability are recognized by the Act, only three kinds of disability are identified by the Legislature in Section 33 for the purpose of providing preferential treatment in the matter of employment under the State or its instrumentalities. They are, blindness or low vision, hearing impairment, locomotor disability or cerebral palsy.

Further, the Legislature specified in the definition under section 2(t)[a] the minimum degree of disability that is required for enabling a person to claim such preferential treatment and that minimum degree is identified at 40%. Further, such a fact is required to be certified by a Medical authority in order to entitle the claimant for such a preferential treatment.

To be called a `person with disability' as defined under the Act, in our view, the person must suffer 40% or more of the disability of hearing impairment as defined under Section 2(l) and further such a fact is required to be certified by a medical authority.

The Union of India made rules in exercise of the powers under Section 73 of the Act in the year 1996. The Certificate contemplated under Section 2(t) is required to be given as per Rule 4 of the above

mentioned rules by a Medical Board duly constituted by the Central and the State Government. Rules 4 to 6 deal with the constitution of the Medical Board, the procedure required to be followed by the Medical Board and the efficacy of the certificate issued by the Medical Board. The Rules read as follows :

> **"4. Authorities to give Disability Certificate**
>
> (1) A Disability Certificate shall be issued by a Medical Board duly constituted by the Central and the State Government.
>
> (2) The State Government may constitute a Medical Board consisting of at least three members out of which at least one shall be a specialist in the particular field for assessing locomotor/visual including low vision/hearing and speech disability, mental retardation and leprosy cured, as the case may be.
>
> **5.** (1) The Medical Board shall, after due examination give a permanent Disability Certificate in cases of such permanent disabilities where there are no chances of variation in the degree of disability.
>
> (2) The Medical Board shall indicate the period of validity in the certificate, in cases where there is any chance of variation in the degree of disability.
>
> (3) No refusal of Disability Certificate shall be made unless an opportunity is given to the applicant of being heard.
>
> (4) On representation by the applicant, the Medical Board may

review its decision having regard to all the facts and circumstances of the case and pass such order in the matter as it thinks fit.

6. The certificate issued by the Medical Board under Rule 5 shall make a person eligible to apply for facilities, concession and benefits admissible under schemes of the Governments or Non-Governmental Organisations, subject to such conditions as the Central or the State Government may impose."

In the background of the complaint in the present writ petition, having noticed in our earlier orders various lapses in the implementation of the Act in the State of Andhra Pradesh, we called upon the Principal Secretary, Department of Education to submit a report regarding the implementation of the Act in the State of Andhra Pradesh, more specifically with reference to the complaint of the petitioner. The Secretary submitted a report dated 14.12.2005. The relevant portion of the report reads as follows :

"4. In this regard, I have called the DEO, Kadapa along with the records and discussed the matter with the DSE and the Commissioner Disabled Welfare Department on 13.12.05 and 14.12.05. ***As seen from the records, it is clearly established that the (5) vacancies that were notified in DSC 2001 were kept vacant without***

carrying them forward to DSC 2002 in view of the decision of the APAT in OA No.3125/2002. The Commissioner & Director of School Education heard the appeals preferred by the candidates and gave his final disposal vide his proceedings No.2477/RC.3/02-2, dated 28.6.2002. As the DSC notification was issued on 10.5.2002, the APAT direction was binding on the DEO and he did not carry forward the vacancies covered by the above OA. ***However, there is serious lapse on the part of the DEO in not pursuing the matter with the Superintendent ENT Hospital, Koti, Hyderabad in obtaining the reports. Thus the vacancies meant for 2002 DSC remained unfilled even today.*** The DEO's office has been directed to send a senior officer to the Superintendent, ENT Hospital, Koti to trace out the records and to see that the candidates referred for physical examination by the DEO are once again contacted and referred.

5. The G.O.Ms. No.72, Education (Ser.VI) Department, dated 3.7.2000 will not be coming in the way of carrying the vacancies to the subsequent recruitment

year. Rule (13)(i) only mentions that there shall be no waiting list. This provision was made in the rule to overcome legal complications from the wait listed candidates in subsequent recruitment. Therefore, it is possible to carry forward vacancies to the subsequent recruitment year as per the G.O.Ms.No.385 GA (Ser.D) Department Dated 18.11.2000, so as to ensure that the vacancies reserved for the physically challenged persons are filled up by that category of persons only. ***The department has taken serious cognizance of the lapse in not filling up the vacancies meant for the physically challenged persons*** and would take up a special drive to complete the recruitment of the backlog vacancies. There is also a need for conducting training to the officials of the department to sensitize them on the importance of filling up vacancies meant for physically challenged.

6. There is also a systemic apathy in referring the cases to the Medical Board and the Medical Boards not certifying in time, either for want of timely follow up by the DEO or the candidates, and the matter will be taken up with the Medical & Health

> Department to give instructions to the concerned Medical Superintendent/Medical Board to give priority in examining the cases referred by DEOs and to complete the process with in a time frame. Perhaps the Department for the Disabled Welfare may have to conduct counseling and hand holding of the applicants during recruitment process which would help in selecting the deserving candidates and obviate such inanimate attitude of the personnel dealing with matters relating to the physically disadvantaged categories of people."

The petitioner is qualified for the post of Secondary Grade Teacher, Telugu. On 11.5.2002, the 2nd respondent issued a Notification calling for applications for the post of Secondary Grade Teachers for Kadapa District. It is indicated in the notification that four Telugu Secondary Grade Teacher Posts are reserved in favour of physically handicapped (Deaf) category. The petitioner made an application and appeared for the examination conducted by the respondents. He asserts in the affidavit filed in support of this petition, that he secured 64% of marks in the examination. His complaint is that the four posts referred to earlier have been filled up although by candidates who secured higher marks than

the petitioner, but those candidates did not suffer any hearing impairment as defined under the Act. It is also the case of the petitioner that in the year 2001 in a similar recruitment process nine (9) candidates were selected under the Hearing Impairment category, but when they were sent to the ENT Hospital, Koti, Hyderabad, for an examination of the genuineness of the claim of hearing impairment, the hospital found none of the selected candidates satisfied the requirement of law to be selected under the above said category. Notwithstanding such conclusion by the competent authority, the nine posts left unfilled for the year 2001, had not been carried forward in the next year to which the petitioner appeared for the selection.

The 1st respondent filed a counter affidavit dated 4.7.2006. Regarding the allegation of the petitioner about the 2001 selection, the substance of the counter is that the records pertaining to selections were destroyed in the floods which occurred in Kadapa District during October, 2001 and insofar as the records of 2002 are concerned, the counter states that they were destroyed obviously by the State.

Pursuant to the directions issued in this case earlier, it appears that the respondents made an effort to reconstruct the records, identified the various candidates who appeared in those two selections, intimated those candidates that they once again be

subjected to the medical examination in the ENT Hospital at Koti, Hyderabad. According to the counter, 55 candidates who appeared for the DSC 2002 Selection and 97 candidates of 2001 Selection were identified belonging to the Hearing Impairment category and they were intimated by the various modes of the necessity to appear for the medical examination. It appears only 19 candidates responded of whom five appeared in both the selections. In other words, factually only 14 candidates appeared before the Medical Board. According to the counter affidavit, none of the 14 candidates satisfied the requirement of belonging to the category of persons with disability (hearing impairment).

The petitioner is also one of them. Insofar as the petitioner is concerned, according to the medical report submitted by the ENT Hospital which is filed as annexure to the counter, the petitioner suffers a 33% disability, the relevant portion of the report is as follows :

> "Audiological Findings :
> Pure Tone Threshold of hearing the Conversational Frequencies
> Rt Ear : 45 dB Lt Ear : 55 dB Percentage of Disability 33 (in words) Thirty three percent.
> He belongs to the category I (in words) first. MILD/

MODERATE/
SEVERE/
PROFOUND – Hearing disability."

Having regard to the background of the case, the technical nature of issue involved and the apathy of the State in dealing with these matters, coupled with the fact that there is no precedent on this question, we thought it fit to examine the matter in detail regarding the correctness of the assessment made by the Medical Board in the context of the above mentioned Act, we requested the Dr.Nandur who appeared in the Court on 5.7.2006 and assisted the Court.

The expressions `hearing impairment' is defined as follows :

"**2.** In this Act, unless the context otherwise requires,-
(l) `heairing impairment' means loss of sixty decibels or more in the better ear in the conversational range of frequencies'.

In order to understand the definition, we enquired from the Doctor as to what is the understanding of the medical profession regarding the expression `loss of 60 decibels' occurring in the above mentioned definition. According to the Doctor, the conversational range of frequencies is 500 Hz, 1000 and 2000 Hz and

sounds in those frequencies are perceivable by a person of normal hearing ability. Even those frequencies can be heard by human beings of normal hearing ability when the volume of sound is between 0 – 25 dBs. Therefore, the doctor opined that a person is to be treated as a person with hearing impairment within the definition of the Act, when such a person cannot hear sound in the conversational frequencies at the decibel levels below 85 (25 + 60).

We respectfully disagree with the opinion given by the Doctor for the following reasons.

When it is said that a person with normal hearing ability can hear sounds ranging from 0 – 25 dBs, it is not necessary that every person who is categorized as a person with normal hearing ability cannot hear the sound at the various decibel levels in the above mentioned range. Its possible that in a given case that a person can hear the sound unless the decibel level is 10 or above in which case since he can hear the sounds between 10 – 25 dBs, the person would still be considered as a person with normal hearing ability by the medical profession. But the fact remains if the sound is below the level of 10 dBs, the person cannot still hear. Therefore, it must be understood that there is a loss of 10 dBs in the case of such a person. Similarly, when a person cannot hear sound if it is below, (let us say), 40 dBs, such a person is not a person with normal hearing ability but according to the opinion of Dr.Nandur, such a

person would still not be qualified to be categorized as suffering from hearing impairment. a statement contrary to the 1st statement of Dr.Nandur that people with normal hearing ability would perceive sound between 0 – 25 decibel level. Therefore, in our view, in a case of the person who lost the ability of hearing upto 40 dBs and must be said that there is a loss of 40 dBs.

For the above reasons when the Act stipulates that loss of 60 dBs or more in the better ear to be called "hearing impairment" All those persons who cannot hear sound below the level of 60 dBs at least in one ear must be called persons with hearing impairment for the purpose of the Act. Whether such a person with hearing impairment is also a `person with disability' is to be determined with reference to the definition of the expression `person with disability' occurring under Section 2(t) of the Act. As can be seen from the said definition for the purpose of the act which is a beneficial piece of legislation in favour of physically challenged persons, a `person with disability' is defined to mean any person suffering from 40% of the disability. Disability in the context of the present case is `hearing impairment'. Having regard to the scheme of the Act, we are of the opini9on that the Parliament did not intend to confer the benefit only on people with total hearing impairment or for that matter any other kind of disability. The Parliament thought it fit to confer the benefit on those persons who

suffer from not less than 40% of the disability or more. In other words, when the impairment is complete, a person is undoubtedly benefits from the Act and also even persons with lesser degree of impairment are also entitled for the benefits of the Act so long as impairment does not fall short of 40% of the total impairment.

If that is the correct legal position, in the case on hand, the petitioner even according to the medical report suffers from a loss of 45 dBs in right ear and 55 dBs in the left ear in the conversational range of frequencies. Therefore, there is a loss of 45 dBs in the better ear i.e., the right ear. If the loss were to be 60 dBs, to be categorized as total hearing impairment, in view of the fact that the petitioner lost only 45 dBs in the better ear, though he could not be legally called a person with total hearing impairment but would still be a person with disability within the meaning of the Act as 40% of 60 dBs will be 24 dBs. In our view, any person who cannot hear sound below the 24 dB level in the better ear is to be treated as a person with disability for the purpose of the Act under the hearing impairment category.

Looked at that angle, the petitioner having lost 45 dB in the better ear must necessarily be classified as a person with disability and is entitled for the benefit of reservation under the Act. We therefore direct the respondents to appoint the petitioner forthwith and we also direct the respondents to consider the cases of all the 14 candidates who appeared for the medical

examination in the light of this judgment and appoint them if they are found to be persons with disability as explained in this judgment.

We also deem it appropriate that in view of the monumental apathy which led to the present situation of depriving the petitioner of his employment opportunity which was mandated by the Parliament that the petitioner is also entitled for damages of public law for an amount of Rs.One lakh to be paid to the petitioner within a period of four weeks from the date of the receipt of a copy of this order.

JUSTICE J.CHELAMESWAR

knk

Dt :04.08.2006

JUSTICE RAMESH RANGANATHAN

---

§ **36. Vacancies not filled up to be carried forward –** Where in any recruitment year any vacancy under section 33, cannot be filled up due to non-availability of a suitable with disability or, for any other sufficient reason, such vacancy shall be carried forward in the succeeding recruitment year and if in the succeeding recruitment year also suitable person with disability is not available, it may first be filled by interchange among the three categories and only when there is no person with disability available for the post in the year, the employer shall fill up the vacancy by appointment of a person, other than a person with disability.

PROVIDED that if the nature of vacancies in an establishment is such that a give category of person cannot be employed, the vacancies may be interchanged among the three categories with the prior approval of the appropriate Government.

[a] – 2(t) - `person with disability' means a person suffering from not less

than 40% of any disability as certified by a medical authority;